No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, Doing Business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Appellees,

APPELLANT'S REPLY BRIEF AND CROSS-APPELLEE'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Statement of Facts.

Appellee contends that appellant in its opening brief has in part misstated facts and for that reason sets forth the facts as it views them. Appellant has accurately stated the facts. Appellee has selected the favorable testimony of its own witnesses and makes this selection the basis of its statement of facts. It disregards all of the contrary testimony upon which the court based its findings of fact.

No useful purpose would be served by going into all of the matters set forth by appellee as to what it believes the

facts are. The record speaks for itself and in this statement of facts appellant merely points out the errors of appellee's contentions and representations.

No notice of the arrival of the car was ever given to appellants' consignee as contended by appellee. Appellee's witness testified that a card had been mailed. Appellant's witness testified that the card had never been received and though they had many previous shipments in only one instance prior to this shipment had they ever received a card. They were usually notified by telephone. [Tr. 107.] Jack Belyea, trucker and agent for the consignee, was *notified by telephone of the arrival of the car on April 11, 1946, and within one-half hour after receiving notice that the car had arrived, Jack Belyea appeared at appellee's track and signed for the car.* [Finding 11, Tr. 21 and 22.] Even appellee's witness, Homan, testified that Belyea came to the car immediately after Homan called him by telephone. [Tr. 139.]

Belyea examined the ice bunkers in the railroad car and found them to be between 50% and 75% full. [Tr. 79 and 98.] Belyea did not request the railroad to further ice the bunkers because he commenced removing the lading from the car soon after it was opened. He testified,

> "When Mr. Homan was present and the door of the car was opened, I called his attention to the fact that the merchandise was wet and soft because I wanted to take a blanket exception on the whole car. I didn't want to accept any responsibility so far as I was concerned. The car was in bad order. Mr.

Homan said he wanted to arbitrate as to how many cases were bad. He would allow me to take an exception of some, but he wouldn't allow me a blanket exception on the entire car. Under the circumstances, when time was running out, *it was getting late in the day and no cold storage facilities available, the only alternative left to protect all parties concerned was to get it on the truck immediately and get it transported to its destination.* I know what the condition was in Los Angeles at that time as to cold storage space. It was very critical. I attempted to find cold storage space to move this merchandise into." [Tr. 76, 77.]

Appellee completely ignores any reference to Homan's act of inserting on the receipt signed by Belyea "no exceptions reported" which words were added by Homan *after Belyea* signed the receipt. [Deft. Ex. A; Tr. 140.] The true facts were that Homan himself saw evidence of damage and that Belyea complained of the car being warm and requested a thermometer. [Tr. 144.] Notwithstanding this condition and the complaints of Belyea, the receipt [Deft. Ex. A] was altered by Homan without Belyea's consent.

Appellee misquotes and misstates the testimony when it alleges that Belyea in his opinion contended only 25 to 30 cases were damaged. Belyea testified:

"Q. Had you been able to get the whole carload of shrimp creole frozen in the warehouse, a cold storage warehouse in Los Angeles, is it your opinion that there would not have been any damage to those cartons?

The Witness: Well, that is a hard question to answer. Providing that the cold storage warehouse would have accepted the merchandise.

Q. Well, let us further assume that the cold storage warehouse would have accepted the merchandise. Now can you answer the question?

The Witness: Well, between 25 and 40 cases were in very doubful condition.

Q. And as to the rest of the car?

The Witness: I believe those could *possibly* have been saved. (Italics ours.) I did in fact make an attempt to get the whole carload, with perhaps the exception of the 25 to 30 cases, into cold storage. It was my thought that if I had been successful in doing so that the cartons *probably* would have been saved—that is the shrimp would *probably* not have been damaged." [Tr. 81, 82.]

There was no finding that the shrimp was not damaged.

Belyea did not testify how many cases he delivered to San Francisco, Sacramento or Bakersfield. The stipulation covered the number of cartons left in San Francisco and the number of cartons left in Bakersfield. Thirty-five cartons were left in the car. Belyea testified as follows: "The soft merchandise, that was apparently already gone, we left in the car." [Tr. 75.]

While appellee's witness, Mulvihill, testified that on April 9, at 3:40 A. M. the bunkers were estimated at 98% full and while on April 10, at 8:00 A. M., the bunkers were estimated 85% full, Mulvihill further testified that

there were no records of any further examination. He testified: "My records do not indicate any further inspection." [Tr. 135.] He also testified: "According to the record, no such inspection was made. My records do not indicate any such inspection." [Tr. 137.] The only other testimony in the entire record is the testimony of Homan who testified that he examined the bunkers and he estimated that they were 75% full on April 11. He testified "When I say I estimated it at 75% *that was my best guess.*" [Tr. 144.] The testimony of Belyea, on the other hand, was that the bunkers were between 50% and 75% full. [Tr. 79 and 98.] There were no markers to indicate the amount or percentage of ice in the bunkers and Homan did not measure the ice in the bunkers. He merely "estimated" that the ice in the bunkers was "about" 75% full, and he did so by looking into a dark bunker *without* any flashlight *from an open light airwell.* [Tr. 144.] The court weighed the evidence of appellant and appellee and came to the conclusion that the bunkers were less than 75% full. It then made its finding, No. 13, that Los Angeles is a regular icing station. The testimony of Mulvihill was that if the bunkers at the time of the delivery of the lading to the consignee are less than 75% full, then and in such event, Los Angeles is an icing station. [Tr. 125.]

The court properly found that Los Angeles was a regular icing station. [Finding 13, Tr. 22.] The court came to this conclusion both from the evidence presented by appellant and from the evidence presented by appellee. The appellee's witness, Mulvihill, testified that "if, on

arrival, the bunkers are less than three-fourths full, 75% full, then they are re-iced here to capacity." [Tr. 125.] The court therefore, based on the testimony of Mulvihill, and coming to the conclusion that the bunkers were less than 75% full, properly found that Los Angeles was a regular icing station.

Appellant and appellee stipulated, "Plaintiff has sustained the following loss: 365 cartons were found to be unfit for human consumption in San Francisco, California. 50 cartons were found to be unfit for human consumption in Bakersfield, California." [Pltf. Ex. 1.]

The stipulation referred to the condition of the shrimp *when it reached San Francisco and Bakersfield* and the court so found. Finding 21, Tr. 25 states:

> ". . . and the court finds that the 50 cases which were received in Bakersfield and the 365 cases which were received in San Francisco or a total of 415 cartons were received at Bakersfield and San Francisco in a damaged condition and was contaminated and was not fit for human consumption . . ."

The purpose of the stipulation was to avoid the necessity of the court hearing witnesses on a fact which was known to all parties concerned. The stipulation referred to the condition at the time the merchandise arrived and not to the strained interpretation which appellee now seeks to place upon the stipulation. The court's finding concurred in by appellee is conclusive.

ARGUMENT.

POINT I.

Appellant Proved That the Frozen Shrimp Creole Left Chicago in a Good and Frozen Condition, Arrived in Los Angeles in a Damaged Condition and That the Damage Was the Result of Appellee's Negligence. Appellant Is Entitled to Damages for Its Total Loss.

Appellee, in its reply brief, states that it is unnecessary to discuss the question of appellee's negligence. It sets forth that the only matter raised by the appeal was the question of whether the court awarded sufficient damages. We concur in this statement. The only question raised is the question of damages since the court reached the conclusion that the appellee was negligent. Without the trial court reaching such conclusion, judgment could not have been awarded to appellant.

Appellee, in its reply brief, then finds fault with appellant's statement of facts and then sets forth the facts not as they are and not as found by the court, but as the appellee would *like* to find them.

The heading of Point II of appellee's reply brief states: "The Findings of the Trial Court Will be Upheld Upon Appeal Unless They Are Clearly Erroneous." Under Point I, however, it proceeds to find fault with the Findings of Fact.

Since Appellee in its argument under Point I argues the question of damages, we will discuss that question under our Point I and discuss the question of the Findings of Fact under Point II.

Appellant did establish a *prima facie* case when it proved to the satisfaction of the trial judge that the frozen shrimp creole left Chicago in a good and frozen condition and arrived in Los Angeles in a damaged condition. The evidence was that the car arrived in a warm condition. The testimony was and the Court so found that the car arrived at a temperature of 54 degrees and that no re-icing had taken place from the time the car left San Bernardino on April 8 and the time it was made available to appellant on April 11. [Findings 12, Tr. 22; and Findings 15, Tr. 23.] During this period of time, 64 hours and 25 minutes elapsed without the car being re-iced, at a time when the temperature in Los Angeles was 86 and 88 degrees. When Belyea opened the car, the car was warm, it emitted no cold air, nor was there any vapor escaping from the car, which is usual and customary when a properly cold car is opened on a warm day. [Finding 16, Tr. 23.]

The evidence further was that 25 to 40 cases were completely deteriorated. They were defrosted and soft. This, in conjunction with the fact that the car arrived at a temperature of 54 degrees, was sufficient to establish negligence on the part of appellee and the burden then shifted to appellee to prove that it was free from negligence. (*Bronstein v. Baltimore & Ohio R. Co.,* 29 Fed. Supp. 837.)

Appellee contends that it is not sufficient to show that the merchandise was found to be damaged at Bakersfield and San Francisco. We agree that the conclusiveness of the damage would have been more securely established if the shrimp creole were analyzed in Los Angeles. On the other hand, the Court found that this shrimp creole

was placed in a refrigerated car and moved to Bakersfield and San Francisco. The Court found that there was no negligence on the part of Belyea. Appellee stipulated and the Court also found that the merchandise was contaminated and not fit for human consumption when it arrived in Bakersfield and San Francisco. It found Belyea free of negligence. It found that other lading was moved in the same truck which moved the shrimp creole to Bakersfield and San Francisco; to-wit, frozen broccoli and frozen cauliflower. The Court found that the frozen broccoli and frozen cauliflower arrived in Bakersfield and San Francisco in good condition.

From these findings it is self-evident that nothing transpired between the time the merchandise left Los Angeles and the time the merchandise arrived in Bakersfield and San Francisco which could have caused damage. If there had been no finding that the car arrived in a warm condition; if there had been no finding of a temperature of 54 degrees; if there had been no finding that 25 to 35 cases were defrosted and soft and spoiled; if there had been no finding that Belyea's truck was properly insulated; if there had been no finding that other frozen products in the truck with the shrimp creole reached Bakersfield and San Francisco in a good condition; if there had been no finding that upon arrival in Bakersfield and San Francisco the shrimp creole was spoiled, contaminated and not fit for human consumption, then there might be some basis to appellee's argument, but with the finding that the car arrived warm and with the finding that there was damage to some of the lading, the only conclusion to be reached is that all of the merchandise was in the same condition because it resulted from the same cause. *Noth-*

ing transpired from the time the shrimp creole left Los Angeles and the time it arrived in Bakersfield and San Francisco which could have caused that damage.

The testimony of appellee's witness Homan conclusively proved the negligence of appellee. Homan was present when Belyea opened the car and the evidence was that Belyea immediately demanded of Homan, a thermometer. This demand was made because of the bad condition of the car. Homan testified that in 35 years of checking an average of 35 cars a day, on only four occasions had a demand for a thermometer been made. Homan reluctantly admitted that there was evidence of defrosting and that some of the merchandise was damaged. While he may have testified on direct examination that, *"I saw three or four soft cases in the doorway. I don't know what they call it—kind of wet, moist-like. Three or four were wet or moist,"* the true facts were that 35 cases were so spoiled as to be left in the car to rot. Homan's testimony conclusively showed an attempt on his part to conceal the true facts. Belyea testified that he desired to take an exception to the entire car, but that Homan would not consent. In spite of the condition in which the car was found upon arrival and notwithstanding the facts just related, appellee's agent Homan still had the audacity to insert on a receipt previously signed by Belyea "No exception reported." [Tr. 140.] Homan testified he inserted those words *after* the receipt was signed and without the knowledge or consent of Belyea. Under these circumstances, we can wholly disregard the testimony of Homan. Homan handled an average of 35 cars a day and appellant proved beyond question of a doubt that his memory was either bad or that he was not

telling the truth. Homan testified that he had Belyea sign the receipt after the car was opened. This does not bear close scrutiny nor is it logical. Belyea testified that he signed the receipt *first* and it is only natural to assume that the appellee would not deliver possession of the car and the merchandise contained therein *without a receipt first being signed.*

It would therefore be the natural deduction and conclusion from all of the facts and from the findings as signed by the Court that the car arrived in Los Angeles in a bad condition with merchandise spoiled. The burden then shifted to the appellee to prove that it was free from negligence and this the appellee failed to do.

Appellee argues in its brief that there may be a difference in the freezing point of shrimp and that of broccoli and cauliflower. It sets forth that appellant should have proved that the freezing point of broccoli and cauliflower was the same as shrimp. It also contends that appellant should have taken the temperature of the lading and not the temperature of the car. Belyea testified he was only concerned with the condition of the car as he found it.

The testimony of Belyea was to the effect that the truck carried *frozen* broccoli and *frozen* cauliflower; that if the temperature of the lading was 25 degrees or more, the refrigerated equipment in the truck would pull the temperature down 15 degrees. It would, therefore, be apparent that if the lading were less than 25 degrees, it would not have been damaged, as expert witness Spoelstra testified that the shrimp starts to defrost and deteriorate only *after* it reaches 25 degrees. At the time the lading was put in the truck, it had already started to deteriorate because nothing intervened between the time the lading

was removed and the time it reached Bakersfield and San Francisco.

Appellee also argues that it was appellant's duty to prove Belyea negligent. *Does it infer that it was appellant's duty to find Belyea negligent even if the facts showed that Belyea was not negligent?* The facts were that nothing which Belyea did could point toward negligence and, therefore, the only negligence apparent from the record was that of the appellee.

Appellee quotes from the case of *Julius Klugman's & Sons v. Oceanic Steam Navigation Co.,* 422 F. 2d 461 (D. C. N. Y., 1930), and attempts to show an analogy between the facts of that case and the facts in the instant case. Scrutiny of the quotation itself will show that that case was properly determined. There the furs were left in a warehouse and the Court came to the conclusion that something may have occurred between the time the furs were originally unloaded and the time the loss was discovered.

The case before the Court is distinguishable, however, because from the facts, it is evident that *nothing* could have occurred from the time the shrimp was unloaded until it was received in Bakersfield and San Francisco. If, in the case cited by appellee, the furs were under the personal scrutiny of a watchman from the moment they were unloaded to the time when the loss was discovered, the Court would have reached a different conclusion.

Again, in the case of *McCready, et al. v. Holmes,* 15 Fed. Cas. No. 8,733 at page 1347, the Court again refers to the control of the merchandise in the hands of various agents. The inference is that something may have hap-

pened while in the hands of the other agents. In the instant case, the evidence was conclusive that nothing transpired while in the hands of Belyea. On the contrary, Belyea's truck reduced the temperature of the shrimp. *Belyea was an independent carrier and defendant, who was found not guilty of negligence; he was not appellant's agent.* [Tr. 26.]

Likewise, in the *McCready* case, the Court refers to the failure on the part of the consignee to examine the merchandise. In the case before the Court, Belyea did examine the goods and Belyea did remonstrate that the car was warm and Belyea did demand a thermometer. Belyea testified he wanted to take an exception to the whole car but that Homan refused to permit it and instead of arguing about it, he attempted to salvage what he could.

Appellee then quotes from the *McCready* case, *supra,* that the coal was carted some distance and then weighed, and that the carts were under the control of the consignee. It is true that the loss could have happened while under the care of the agents of the consignee. But again we must distinguish that case from the one before the Court because here the evidence conclusively showed that *nothing* transpired which could have caused the loss. In the case before the Court, appellee stipulated that the shrimp creole arrived in Bakersfield and San Francisco in a damaged condition and the Court so found. When we consider that the broccoli and cauliflower arrived in good condition, but the shrimp in bad condition, we can only come to the conclusion that nothing transpired while the merchandise was in the hands of Belyea because the Court found Belyea was not guilty of negligence.

POINT II.

The Amount Allowed to Appellant for Damages Is Inadequate, Unreasonable and Arbitrary and Is Contrary to the Weight of the Evidence and the Findings of Fact.

Appellee, in its argument under Point II contends that the findings of the trial court should be upheld unless they are "clearly erroneous." We concur with that statement. We contend that the Findings of Fact adequately established the loss of appellant, but that the Court granted judgment for an improper amount.

It should be pointed out that the appellees concurred in the Findings of Fact with which they found fault in Point I of their brief. Rule 7 of the Rules of Civil Procedure of the District Court of the United States for the Southern District of California, provides,

> "No document governed by this rule (referring among other things to Findings of Fact), shall be signed by the Judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the Judge, within five (5) days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor."

The rule further provides for the filing of objections, the hearing and argument thereon and the modifications of proposed Findings of Fact and Conclusions of Law. In the instant case Findings of Fact were submitted to the appellee for approval. Appellee requested certain changes in these Findings of Fact which changes were made by appellant, and *before* the Findings of Fact were submitted to the trial judge they were approved by the appellee.

Appellee cannot therefore at this late date find fault with the Findings of Fact or to argue that they are not correct. While appellee in Point II of its reply brief contends "the Findings of the trial court will be upheld upon appeal unless they are 'clearly erroneous' " in Point II of its cross-appeal, it contends that the Findings of Fact are not correct and are, in fact, improper. In other words, in reply to appellant's brief, it argues that the Findings of Fact are correct but in its opening brief on its cross-appeal, it contends that the Findings of Fact are incorrect. Appellee takes this inconsistent stand notwithstanding the fact that appellee *approved* the Findings of Fact.

It is difficult to treat both matters separately and we wish therefore at this point to set forth some of the inconsistencies of appellee in its argument. Appellee contends that the court erred in its Finding 13 which reads: "Los Angeles is a regular icing station." [Tr. 22.] The court could reach this conclusion by several means. Appellee's own witness, Mulvihill, who is assistant manager of appellee's refrigerated department and who has been in appellee's employ for over 20 years, testified that Los Angeles was a regular icing station. In answer to a question by appellee as to whether Los Angeles was a regular icing station, he testified "On some traffic. Not on destination. If the bunkers are three-fourths full on arrival." [Tr. 125.] He further testified "San Bernardino is a regular icing station. If a car has been iced in San Bernardino ice is added in Los Angeles if, on arrival, the bunkers are less than three-fourths full, 75% full then they are re-iced here to capacity * * *." [Tr. 125.]

This testimony taken together with the testimony of Belyea that he found the bunkers *between* 50% and 75%

full is sufficient to establish Los Angeles as a regular icing station even under appellee's view of the facts.

Appellee's witness, Homan, did not testify that the bunkers were 75% full. He testified that the bunkers were *"approximately 75% full."* He stated that he merely *estimated* the amount of ice in the bunkers. How Homan could come to the determination that the bunkers were more than 75% full or how appellee could come to the conclusion that no re-icing was necessary, we can not possibly conceive. Mr. Homan testified:

> "I examined the bunkers by opening them up. I climbed up on top. I did not have a flashlight with me. I just looked down into it. There was no light in the bunkers—there was ice down there and I just looked down in there. I just glanced down and *estimated as to what the car had. There are no markers in there to indicate how much ice is in the bunkers. When I say I estimated it at 75%, that was my best guess* * * *."

It is apparent from this testimony of Homan that his estimate of 75% was merely a "guess" and that he made no accurate determination. How would Homan even estimate it at 75% by looking down into a dark hole from a lighted area without a flashlight and without any indication of the height of the bunkers or any markings in the bunker? From these facts and coupled by the testimony of Belyea that the bunkers were *between* 50% and 75% full, was the Court not justified in coming to the conclusion that the bunkers were *less* than 75% full and that therefore Los Angeles was a regular icing station? Is not therefore Finding of Fact 13 "That Los Angeles is a regular icing station" accurate?

If Los Angeles is a regular icing station and appellee in approving the Findings of Fact concurred that it was, and the Court so found, *then appellee was negligent when it failed to re-ice in Los Angeles.* Appellee merely glosses over this very substantial evidence. Appellee, at page 22 of its brief, quotes Rule 225 of the Perishable Protective Traffic No. 13, Defendant's Exhibit "C". *Appellee admits that the bunkers had to be re-iced if the car arrived at its destination with the bunkers less than three-fourths full of ice.* In view of the foregoing facts, in view of the testimony of Mulvihill and Homan, both witnesses of appellee, and the testimony of Belyea, the Court could come to only one determination and that is that the bunkers were less than three-fourths full and that therefore re-icing in Los Angeles was required by appellee. *Its failure to re-ice was negligence.*

The icing instructions required the appellees "to insure icing to capacity, 13000 pounds crushed ice and 3900 pounds salt, re-iced to capacity, crushed ice, 30% salt *at all regular icing stations, and oftener if delayed,*" this required the appellee to re-ice in Los Angeles, which the Court found was a regular icing station. The failure of the appellee to re-ice established the negligence beyond a question of doubt. It is this negligence which caused the damages suffered by appellant. Had the appellee re-iced, no damage would have ensued. It was like a cow which gives a full bucket of milk and then kicks it over. Appellee apparently performed its duty nearly to the very end, but when it reached the point at which it required the

greatest amount of care, namely, when the car was shunted about from San Bernardino to Los Angeles in a temperature of 88 degrees, there appellee left the car uniced and unattended.

It is interesting to note that while only six (6) days elapsed between the time the car left Chicago and the time it arrived in San Bernardino, 2400 miles away, it took this same car three days to travel from San Bernardino to Los Angeles, only 60 miles away. The icing instructions provided that the car was to be iced "oftener if delayed." [Finding 6, Tr. 20.] Apparently appellee did not consider this a delay. The facts were that the car was delayed, that the car was shuttled about for three days before it was placed on a siding accessible to appellant. [Tr. 69.]

Even assuming Los Angeles was not a regular icing station, this was a delay which required appellee to re-ice. Its failure to re-ice caused the damage suffered by appellant. It is difficult to comprehend why appellee iced its car on an average of every 18 hours and 50 minutes en route from Chicago to San Bernardino when the various temperatures through which the car passed averaged approximately 50 degrees mean temperature, and why it failed to ice the car for 64 hours and 25 minutes, when the temperature in Los Angeles reached 88 degrees.

We respectfully submit that this was negligence on the part of the appellee and the Court so found when it awarded damages to appellant for the soft and spoiled cartons which were visibly soft and spoiled. The error of

the Court was in the failure of the Court to award appellant all of its damages. We submit appellant proved beyond a reasonable doubt that the shrimp was damaged when it arrived in Los Angeles. True, the damage may not have been visible, but the damage nevertheless existed. The fact that it was ascertained within a relatively few hours after consignee moved the merchandise should not alter the liability of appellee for failing to properly ice and for failing to deliver the merchandise in a frozen condition.

After appellant established a *prima facie* case, the burden shifted to appellee to prove that it was free from negligence and this the appellee failed to do. We respectfully submit that judgment should be awarded appellant for the full amount of its damage, to wit, the sum of $4,455.00, plus its loss of freight in the sum of $269.75, or a total of $4,724.75, together with interest from April 2, 1946, and its costs of suit.

CROSS-APPELLEE'S REPLY BRIEF.

I.

The evidence of cross-appellee conclusively proved that cross-appellant was negligent in transporting cross-appellee's merchandise from Chicago to Los Angeles. All of the arguments set forth in appellant's opening brief and appellant's reply brief are pertinent to the cross-appeal and we adopt the same as a part of the cross-appellee's brief on the cross-appeal. Cross-appellee proved beyond any question of doubt the negligence of cross-appellant and the trial court properly granted judgment for the cross-appellee, excepting that the judgment granted was not sufficient and did not cover the total loss of cross-appellee.

II.

The trial court did not err in applying the facts of the case as it found them to the law but failed to grant cross-appellee the proper amount of damages. The trial court found that Los Angeles was a regular icing station. [Finding of Fact 13, Tr. 22.] The cross-appellant did not re-ice in accordance with the shipper's instruction. This failure to re-ice was the cause of the damage sustained by cross-appellee. The judgment for cross-appellee is in conformance with the findings but the Court erred in not awarding cross-appellee all of the damage sustained by it as a result of cross-appellant's negligence.

ARGUMENT.

POINT I.

The Evidence Introduced at the Trial Disclosed That Cross-Appellant Was Negligent and the Burden of Going Forward With the Evidence Shifted From Cross-Appellee to Cross-Appellant to Prove That Cross-Appellant Was Free From Neglect and That the Damage to the Goods Resulted Either Fom an Act of God, Public Enemy or the Inherent Nature of the Goods Themselves.

We concede that a rail carrier is not an insurer of perishable commodities entrusted to its care for transportation. We also concede that perishable commodities may spoil by virtue of its own inherent vice. The rail carrier however owes the duty to exercise the care warranted under the circumstances. It must remain free from negligence.

Cross-appellee made out a *prima facie* case of delivery to the carrier in good condition and receipt in bad condition when it established that the car arrived at a temperature of 54 degrees and the visible merchandise spoiled. The burden then shifted to the railroad carrier to prove that it was free from negligence. The rail carrier did not satisfy this requirement and therefore the Court ordered judgment in favor of appellant and cross-appellee. The evidence was that Los Angeles was a regular icing station and under the Protective Tariff as cited by cross-appellant and under the testimony of Mulvihill, cross-appellant owed the duty to re-ice. It is undisputed that there was no re-icing in Los Angeles.

We concede that shrimp creole is a perishable commodity and that the seals on the car were intact until removed by Belyea in the presence of Homan. While cross-appellant

contended that the car arrived on time it cannot dispute the fact that it took this car only six days (from April 2 to April 8) to move from Chicago to San Bernardino, a distance of 2400 miles, whereas it took the same car three days (from April 8 to April 11) to move from San Bernardino to Los Angeles, a distance of 60 miles. While the average temperature en route from Chicago to San Bernardino was approximately 50 degrees, the average temperature from San Bernardino to Los Angeles was approximately 86 degrees.

Cross-appellant contends that consignee was promptly notified of the arrival of the car in Los Angeles. The facts were and the evidence is that Belyea was looking for the car and called Homan daily for a period of four or five days to try to locate the car and was advised by Homan that they had had some trouble in spotting the car and Homan called Belyea when the car was finally spotted on April 11. [Tr. 69 & 70.] Cross-appellant's witness, Mulvihill, testified that there were tracks where the car was spotted on which the car could be placed and which would make it inaccessible to cross-appellee. [Tr. 129.]

The car was not regularly iced in conformance with shipper's instructions. The facts are that the car was improperly iced in that Los Angeles was a regular icing station [Finding 13, p. 22] and the cross-appellant failed to re-ice in Los Angeles in accordance with the icing instructions. This was negligence on the part of cross-appellant. It was cross-appellant's failure to comply with the icing instructions which caused the damage. Cross-appellant left the car standing in a broiling sun for a period of almost three days with a temperature of 86 to 88 degrees without re-icing. This was a breach of its contract and a violation of its duty under the Protective Tariffs referred to by cross-appellant in its brief.

Cross-appellant, at page 19 of its brief, refers to Rules 130 and 135 of the Perishable Protective Tariff and alleges that the shipper must show that there was a lack of ordinary care on the part of the carrier. It sets forth further that proof by the carrier of compliance with the shipper's instructions is a complete defense to an allegation of negligence in connection with the protective service and quotes the cases of *Sutton v. Minneapolis & St. L. Ry. Co.,* 222 Minn. 233, 23 N. W. 2d 561; *Southern Pacific Co. v. Itule,* 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1274, and *Atlantic Coast Line R. Co. v. Georgia Packing Co.,* 164 F. 2d (C. C. A. 5, 1947).

Cross-appellee did prove failure of the carrier to comply with the shipper's instructions. The instructions were to re-ice at all regular icing stations. The Court found Los Angeles to be a regular icing station. [Finding 13, Tr. 22.] Cross-appellant admits it did not re-ice in Los Angeles. By failing to re-ice, cross-appellant breached the shipper's instructions and failed to comply with them. This was negligence.

Cross-appellant finds fault with cross-appellee's citation of *Hall v. Nashville & Chattanooga R. Co.,* 13 Wall. 367, 20 L. Ed. 594, and *Crinella v. Northwestern Pacific R. Co.,* 85 Cal. App. 440, 259 Pac. 774. In the latter case cross-appellant states that the railroad was at fault because the car was not iced at regular icing stations. Are not those facts applicable here? In the case before the Court the railroad failed to ice at a regular icing station. Since it is admitted that Los Angeles is a regular icing station [Finding 13, Tr. 22] and since it is admitted that no ice was added to the car in Los Angeles, the facts in the case before the Court are identical with those in the case of *Crinella v. Northwestern Pacific R. Co., supra,* cited by cross-appellant.

Cross-appellant then refers to the loading of the goods. The testimony of the witness, Hale C. Burrus, of the Fulton Cold Storage Market to the effect that the merchandise was properly loaded is without dispute. [Tr. 64, 65 & 66.]

There was no evidence that the damage sustained by cross-appellee was due to "the vice of the goods" or "act or default of the shipper." Cross-appellant mis-states the evidence when he states "plaintiffs' witness testified that it is preferable to place stripping along the sides of a refrigerator car in order to promote the circulation of cold air. (Cross-appellant's Brief, p. 21.) The witness, whose testimony cross-appellant quotes, is that of the defendant, Belyea. Belyea was not cross-appellee's witness. Belyea was a defendant in the action and was examined pursuant to Rule 43 of the Federal Rules of Civil Procedure as an adverse witness and we submit to the Court that it is unfair and improper for cross-appellant to make such statements in its brief when it is fully aware of the true facts. It is misleading to so present the matter.

Cross-appellant refers to stripping the car. This evidence and all matters in connection therewith was a red herring presented solely for the purpose of avoiding the real issues in the case. Apparently the Court did not consider it of much importance because there was ample and sufficient evidence in the record that stripping was unnecessary. Burrus testified that he was superintendent of the Fulton Market Cold Storage Company in Chicago and that he had been with that company for 24 years and he testified that in his experience of over 18 to 24 years the type of car used by cross-appellee and the method of loading the merchandise was the common practice in loading refrigerated cars. He testified that this method had been used thousands of times without any loss and that from

his experience less than 5% of all of the refrigerated cars ever have any stripping on them. [Tr. 61-63, 64.]

Furthermore, the evidence was that the lading in the car was only 3 feet high, whereas the height of the car itself was 8 feet. The evidence further shows that there was an air space below the lading of several inches and it is unquestionable that there was ample ventilation in the car. [Tr. 105, 106.] Belyea testified:

> "The packages being 8 to 10 inches high and this merchandise being stacked 3 boxes or 4 tiers high on the outside; I would estimate that it was 3 to 3½ feet in height. The rest of the car was empty. I believe that the car is 8 feet high inside. Five of the eight feet was ventilation space. The purpose of stripping a car is when a car is filled it can get some circulation through the car, that is, where it is solidly packed, but they put these strips along the wall to permit air to get around the packages." [Tr. 105, 106.]

Cross-appellant then refers to the testimony of Mulvihill and represents that Mulvihill testified that Los Angeles is not a regular icing station on cars destined to Los Angeles when the bunkers are three-fourths full of ice. (Cross-Appellant's Brief, p. 23.) The evidence was, as we have heretofore referred to in the appellant's brief and reply brief, that the bunkers were *less* than three-fourths full of ice and this was testified to by Belyea, as well as Homan. Homan did not testify that the bunkers were 75% full. He *"estimated"* it was 75% full. *That was his best guess.* [Tr. 144.] From this evidence, the Court reached the finding that Los Angeles was a regular icing station and cross-appellant approved that finding. The failure to re-ice was therefore negligence on the part of cross-appellant.

POINT II.

The Findings of Fact Support Conclusions of Law and Judgment in Favor of Cross-Appellee, but the Court Erred in Not Granting Cross-Appellee the Full Amount of Damages as Prayed for in Its Complaint.

The Findings of Fact lead to but one conclusion, namely, that the cross-appellant breached its contract of carriage in negligently transporting the merchandise and in failing to properly ice and salt the lading in accordance with instructions and in accordance with the protective tariff applicable to perishable properties.

The Findings of Fact show a delivery of the merchandise in good condition to the carrier with adequate instructions for its protection, and the arrival of the lading in Los Angeles with some of the lading obviously and visibly damaged and unfit for human consumption, and a portion in any event in a questionable condition. The 415 cartons which were in a questionable condition were then transported by the defendant Belyea to other points where they arrived in a damaged condition. Complaint was made against both carriers and after all the evidence was considered the Court found that defendant Belyea was not guilty of any negligence. [Finding 24, Tr. 17 to 26.]

Based on the foregoing specific Findings of Fact, the Court made certain Conclusions of Law. The cross-appellee has particularly referred to Conclusions of Law No. 4 and No. 7. [Tr. 27 and 28.]

A reading of Conclusion of Law No. 4 will indicate that it is merely a statement of the general rule of law, to wit: That under the applicable Perishable Protective Tariff, if goods arrive at the place of delivery in damaged

condition caused by lack of ordinary care on the part of the carrier, the carrier is liable. Further, that compliance with the conditions of the Perishable Protective Tariff is a defense against any charge of negligence and that the measure of the duty of the carrier is to use reasonable ordinary diligence.

It should be noted that Conclusion No. 4 does not state cross-appellant complied with the conditions of the Perishable Protective Tariff. This Conclusion is a mere recital of the general rule of law and goes no farther.

Similarly Conclusion of Law No. 7, which is quoted in part by cross-appellant on page 24, is not a conclusion that the cross-appellant complied with the Tariff Regulations, nor is it a conclusion that the cross-appellant was free from negligence. A reading of the entire paragraph rather than the portion quoted by cross-appellant will so indicate.

Cross-appellant is attempting to show from certain *general statements* in the Findings and in the Conclusions of Law that the Court found the cross-appellant free from negligence and that it had complied with the Protective Tariff Regulations and with the terms of its Bill of Lading. No such conclusion can reasonably be reached from the general statements in the Conclusions of Law referred to by cross-appellant.

It is a general rule that special findings will control a general finding in the event of inconsistency. 64 *Corpus Juris* 1261, Sec. 1109. *In re Reid's Estate,* 79 Cal. App. 2d 34, 179 P. 2d 353, wherein the Court quoted from

Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal. 2d 103, 118, 53 P. 2d 929, 936, in part as follows:

> ". . . It is also well settled, however, that when a general finding conflicts with a special finding the latter controls. . . ."

To the same effect see *Lobb v. Brown,* 208 Cal. 476, 281 Pac. 110.

Cross-appellant refers to Finding of Fact No. 13 on page 25 of its brief. This Finding is a very simple one, to the effect that Los Angeles is a regular icing station. Cross-appellant attempts to relieve itself completely from the effect of this simple finding by coming to an erroneous conclusion based upon an incorrect assumption. Referring the Court to the cross-appellant's brief, page 25, it will be noted that it is therein stated by cross-appellant that it is true that on some traffic, where the ice in the bunkers has fallen below 75% of capacity, that Los Angeles is a regular icing station on destination traffic. Cross-appellant then starts with the erroneous assumption that the ice in the bunkers was not below 75% capacity and, therefore, Finding of Fact No. 13 is erroneous. Viewing the evidence most favorably to cross-appellant, which the appellate court is certainly not required to do, the most that can be said is that there is a conflict in the testimony as to whether the ice in the bunkers was below or above 75% capacity. This conflict was determined in favor of the cross-appellee by the trial court and will not be disturbed on appeal. Thus, cross-appellant's argument falls completely because we must start with the assump-

tion that the ice in the bunkers upon arrival in Los Angeles was less than 75% of capacity.

The trial court held that cross-appellant was negligent when it specifically held by its Finding No. 13 that Los Angeles is a regular icing station because before the trial court could do that, it had to hold that the ice in the bunkers had fallen below 75% of capacity. That being so, the cross-appellant had not complied with the Protective Tariff applicable, had breached the terms of the Bill of Lading and had not complied with the icing instructions of the cross-appellee.

Conclusion.

It is respectfully submitted as follows:

(1) That the evidence introduced at the trial established that the rail carrier was negligent in its carriage of the lading.

The lading was delivered to the carrier in Chicago in good condition and arrived in Los Angeles in a damaged condition. The carrier failed to establish that it complied with the icing instructions or the applicable protective tariff. On the contrary, the evidence particularly proved and the trial court found that the carrier did not comply with the icing instructions and the protective tariff.

(2) The cross-appellee did more than satisfy the burden of proof by affirmatively proving the particulars wherein the rail carrier was negligent.

(3) The Findings of Fact and Conclusions of Law set forth that cross-appellant breached its contract of carriage

in failing to protect the lading as required by the applicable protective tariff and the shipper's instructions and that the carrier was negligent.

(4) In fixing the amount of damages, the trial court was in error in failing to give judgment for cross-appellee for the full amount of its loss in the sum of $4724.75 and in limiting the amount of cross-appellee's damage to only that portion of the lading which was *visibly* damaged.

We therefore request this Court to reverse the trial court's judgment and enter judgment in this Court for cross-appellee for the sum of $4724.75, or in the alternative, to instruct the trial court to enter judgment in said amount for cross-appellee.

Respectfully submitted,

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